In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-480

MELVIN HARVEY TOBIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of willfully refusing to submit to induction, in violation of 50 U.S.C. App. 462 (a); he was sentenced to three years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. 15-19).[1]

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[1] An amended opinion was filed by the court of appeals on September 3, 1971 (Pet. App. 20-21).

Petitioner registered with Local Board Number 16, Pittsburgh, Pennsylvania, and on December 15, 1967, he was classified II-S as a full-time college student. After holding that deferment for approximately a year, petitioner was reclassified I-A on January 8, 1969, since he had failed to furnish the board with evidence of continuing student status. He was promptly notified of his reclassification and was advised of his right to a personal appearance or an administrative appeal, and of the availability of a government appeal agent to assist him. Petitioner did not pursue his appeal rights.

On January 17, 1969, petitioner wrote to the board, advising that he had withdrawn from college on January 6, 1969; he requested a Special Form for Conscientious Objectors (SSS Form 150). The form was mailed to him on the same day, with a return date of February 17, 1969; it was never returned.

On March 26, 1969, petitioner was ordered to report for induction on April 21, 1969. He reported as scheduled but refused to take the symbolic step forward. The present conviction followed and the court of appeals affirmed *per curiam* (Pet. App. 15-19).

1. Petitioner contends here, as he did below, that his conviction should be overturned because three of the five local board members lived outside the area in which the local board had jurisdiction, purportedly in conflict with the then applicable area residency regulation, 32 C.F.R. (1969 ed.) 1604-52(c). He objects particularly to the court of appeals' holding that he is precluded from raising this claim in the courts because he failed to exhaust his administrative remedies.

The position of the court below is, however, well taken. At no time during the administrative process did petitioner raise an objection to his I-A classification. While he did request a conscientious objector form, a form was mailed to him and he never returned it; nor did he submit any other information to the board indicating that he intended to claim exempt status as a conscientious objector, or that he was entitled to a I-O classification. Having failed to contest his classification administratively, he should not now be permitted to come into court and challenge it for the first time in the judicial process.

This is especially so where the claim here goes not at all to the merits of his classification, but involves only a collateral attack on the composition of the local board that issued the order of induction. Whatever the composition of the board, that factor has little relevance in the particular circumstances of this case since petitioner's acceptability for military service was "not dependent upon an act of judgment by the Board." *Clark* v. *Gabriel*, 393 U.S. 256, 258. Petitioner was required to register when he attained the prescribed age, regardless of the composition of the local board (50 U.S.C. App. 453; cf. *Toussie* v. *United States*, 397 U.S. 112). His deferment as a full-time college student rested on the fact that he met the specific requirements of the governing regulations (see 32 C.F.R. 1622.25). When in 1969 he failed to provide information which would warrant continuation of the deferment,[2] the local board had no choice but to clas-

[2] As indicated earlier, on January 17, 1969, petitioner advised the board that he had withdrawn from college and was no longer a full-time student at the university.

sify him I-A (see 32 C.F.R. 1622.10, 1622.25). Petitioner thereafter passed the requisite physical examination and was available to be called in proper sequence. The order of priority of induction was therefore automatic (see 32 C.F.R. 1631.6-1631.7), and the board's role was essentially ministerial. It is therefore entirely artificial to argue that the composition of the board has any impact on this case.

2. At all events, the failure of local board members to satisfy the "area residency" requirement is not sufficient to nullify action taken by the board. The regulatory provision (32 C.F.R. (1969 ed.) 1604.52 (c)) that members reside in "the area in which their local board has jurisdiction"—which was repealed by executive order on September 2, 1970 (Executive Order 11555, 35 Fed. Reg. 14191)—was by its terms not absolute, but rather turned on a determination of practicability; 32 C.F.R. (1969 ed.) 1604.52(c) provided that local board members shall "if at all practicable, be residents of the area in which their local board has jurisdiction."

It has long been recognized that acts of draft boards, like those of malapportioned legislatures (cf. *Baker* v. *Carr*, 369 U.S. 186), "are acts of a de facto political authority," *Clay* v. *United States*, 397 F. 2d 901, 911 (C.A. 5), vacated on other grounds, *sub nom. Giordano* v. *United States*, 394 U.S. 310; *Sellers* v. *McNamara*, 398 F. 2d 893 (C.A. 5), certiorari denied, 395 U.S. 950. As such they are valid despite irregularities in the composition of the board and are not subject to collateral attack. See, *e.g.*, *United States* v. *Collins*, 426 F. 2d 765 (C.A. 5), certiorari denied, 400 U.S. 919; *Czepil* v. *Hershey*, 425 F. 2d 251

(C.A. 7), certiorari denied *sub nom. Czepil* v. *Tarr*, 400 U.S. 849; *United States* v. *Chaudron*, 425 F. 2d 605 (C.A. 8), certiorari denied, 400 U.S. 852; *United States* v. *Reeb*, 433 F. 2d 381 (C.A. 9). This principle, "founded upon considerations of policy and necessity" (*Norton* v. *Shelby County*, 118 U.S. 425, 441), applies with equal force whether the regulation is viewed as mandatory (cf. *United States* v. *Nussbaum*, 306 F. Supp. 66, 67 (N.D. Cal.)) or as directory (*United States* v. *Wallace*, 435 F. 2d 12 (C.A. 9), certiorari granted and cause remanded on other grounds, 403 U.S. 902). As this Court observed in *Ex parte Ward*, 173 U.S. 452, 456: "[T]he title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked."[3]

3. Moreover, as we have pointed out, the area residency requirement was repealed by executive order on September 2, 1970, leaving as the only residency requirement that members of the local boards must reside in the county served by the board (50 U.S.C. App. 460(b)(3); 32 C.F.R. (1971 ed.) 1604.52 (c)). Consequently, the question raised here concerning the

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[3] Nor does the Sixth Circuit's decision in *United States* v. *Cabbage*, 430 F. 2d 1037 hold otherwise. In *Cabbage*, a criminal conviction for refusal to report for induction, the court of appeals declined to invalidate an induction order on the ground that the local board was not properly constituted under 32 C.F.R. 1604.52(c). Since it found the order to be invalid on another ground, however, the court urged (without so ordering) that the board be reconstituted in accordance with the then existing area residency requirement, stating that Cabbage would not be subject to reclassification until this was done.

composition of petitioner's local board is not one of continuing legal significance requiring further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.

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